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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

BUDD LEPMAN,

Petitioner,

v.

NEW JERSEY RACING COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT NEW JERSEY RACING COMMISSION

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BRIEF IN OPPOSITION

The respondent, New Jersey Racing Commission, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the decisions of the New Jersey Supreme Court entered in these two cases on July 24, 1985.*

* Although two separate suspensions and two separate appeals, which were never consolidated for review by the New Jersey appellate courts, are involved here, Lepman has filed a single petition for a writ of *certiorari* seeking to have this Court review the two orders of dismissal issued by the New Jersey Supreme Court.

COUNTERSTATEMENT OF THE CASE

Petitioner Budd Lepman is a licensed trainer of racehorses in the State of New Jersey. On July 1, 1982 and again on August 11, 1982, the drug phenylbutazone was detected in two of Lepman's horses after post-race blood and urine analyses had been conducted by representatives of the New Jersey Racing Commission (App. 8a; App. 2a). Based upon these findings, the Racing Commission found in each case that Lepman had violated the New Jersey Trainer Responsibility Rule, *N.J.A.C.* 13:70-14A.7, which places absolute responsibility upon the trainer of the horse to protect and guard it from the administration of any drug, and Lepman's racing privileges were suspended for periods of 30 and 45 days, respectfully, for each violation (App. 8a; App. 2a). The Racing Commission's decisions were subsequently affirmed by the New Jersey Superior Court, Appellate Division, in two separate written opinions (App. 7a to 12a; App. 1a to 6a). Lepman appealed both Appellate Division decisions to the New Jersey Supreme Court which, on July 24, 1985, granted the Racing Commission's motions to dismiss the appeals on the ground that Lepman had failed to raise a substantial question arising under the Constitution of the United States or of the State of New Jersey (App. 13a to 14a). The facts underlying each separate suspension will now be set forth.

A. The July 1, 1982 Race

On July 1, 1982, "Raise A Mint," a horse under the training and care of Lepman, finished eighth in the fourth race at the Monmouth Park Racetrack. A post-race urine and blood analysis of the horse conducted by representa-

tives of the New Jersey Racing Commission disclosed the presence of the anti-inflammatory drug phenylbutazone (App. 8a). Following a hearing, the Board of Stewards of the Monmouth Park Racetrack found Lepman in violation of *N.J.A.C.* 13:70-14A.7, commonly known as the Trainer Responsibility Rule, and ordered his suspension from racing for 30 days (App. 8a). Lepman appealed this determination to the Racing Commission, which stayed the imposition of the suspension and transferred the matter to the New Jersey Office of Administrative Law for hearing as a contested case. After a hearing, the Administrative Law Judge issued an initial decision in which he concluded that Lepman had violated the Trainer Responsibility Rule, but he recommended that the suspension should be reduced to 25 days (App. 8a). The Racing Commission, in its final decision of May 26, 1983, adopted the findings of the Administrative Law Judge that Lepman had violated the Trainer Responsibility Rule, but reimposed the original 30-day suspension (App. 8a).

On June 9, 1983, Lepman filed a Notice of Appeal with the New Jersey Superior Court, Appellate Division, challenging the suspension. He also filed motions for a stay of the suspension pending appeal with the Appellate Division, a single Justice of the New Jersey Supreme Court and the entire New Jersey Supreme Court. These motions were denied and Lepman served the 30-day suspension during the period between June 13 and July 12, 1983.

In a *per curiam* decision dated January 17, 1984, the Appellate Division affirmed the final decision of the Racing Commission. In so ruling, the court specifically held that the substance found in Lepman's horse after the race, phenylbutazone, was an anti-inflammatory drug which was

prohibited under *N.J.A.C.* 13:70-14A.7 and *N.J.A.C.* 13:70-20.11(a)(3) (App. 8a to 12a). The court further held that the intent of the regulations "is obviously to make it a violation for a prohibited substance to be administered sufficiently near the time of a race to be detected by . . . [post-race urine and blood testing of a horse]" (App. 11a). Because the anti-inflammatory drug phenylbutazone was detected in the urine and blood tests taken of Lepman's horse following the race, the court held, citing its decision in *Dare v. State,* 159 *N.J. Super.* 533, 388 *A.*2d 984 (App. Div. 1978), that Lepman had violated the Trainer Responsibility Rule and had been properly suspended from racing for the 30-day period between June 13, 1983 and July 12, 1983 (App. 7a to 12a).

Lepman filed a Notice of Appeal from this decision with the New Jersey Supreme Court on February 6, 1984. On April 9, 1984, the Racing Commission filed a motion to dismiss Lepman's appeal on the ground that it did not present a substantial question arising under the Constitution of the United States or of the State of New Jersey. The New Jersey Supreme Court granted the Racing Commission's motion and dismissed Lepman's appeal on July 24, 1985 (App. 14a).

B. The August 11, 1982 Race

On August 11, 1982, "Silver Valley," a horse under the training and care of Lepman, finished first in the eighth race at the Monmouth Park Racetrack. A post-race blood analysis of the horse disclosed the presence of the anti-inflammatory drug phenylbutazone. Following a hearing, the Board of Stewards suspended Lepman's racing privileges for 45 days for violation of the Trainer Responsi-

bility Rule (App. 2a). Lepman appealed this determination to the Racing Commission, which stayed the imposition of the suspension and transferred the matter to the New Jersey Office of Administrative Law for a hearing. After a hearing, and a subsequent rehearing, the Administrative Law Judge issued an initial decision holding that Lepman had violated the Trainer Responsibility Rule, but recommending that the penalty be reduced to a $500 fine and a 10-day suspension (App. 2a to 3a). The Racing Commission, in its final decision of December 1, 1983, adopted the findings of the Administrative Law Judge that Lepman had violated the Trainer Responsibility Rule, but reimposed the original 45-day suspension (App. 3a).

On December 9, 1983, Lepman filed a Notice of Appeal with the New Jersey Superior Court, Appelliate Division. On that same date, he made an application for a stay of the suspension pending appeal which was granted by the Appellate Division.

In a *per curiam* decision dated May 28, 1985, the Appellate Division affirmed the final decision of the Racing Commission (App. 1a to 6a). As in the previous case, the court specifically held that the substance found in Lepman's horse after the race, phenylbutazone, was an anti-inflammatory drug which was clearly prohibited under 13:70-14A.7 and *N.J.A.C.* 13:70-20.11(a)(3) (App. 4a). The court also held that Lepman's argument that the Trainer Responsibility Rule was based upon "an unconstitutional irrebuttable presumption" was without merit and had previously been rejected in numerous other New Jersey cases (App. 4a). Because the anti-inflammatory drug phenylbutazone was detected in Lepman's horse following the

race, the court held that Lepman had violated the Trainer Responsibility Rule and had properly been suspended from racing for a period of 45 days (App. 1a to 6a).

Lepman filed a Notice of Appeal from this decision with the New Jersey Supreme Court on June 5, 1985. Lepman's motion for a stay of the suspension was denied by the New Jersey Supreme Court on June 14, 1985. On June 18, 1985, Lepman made an application for a stay pending appeal to the United States Supreme Court, which was denied on June 19, 1985. Thus, as in the previous case, Lepman has already served the 45-day suspension imposed by the Racing Commission.

On June 27, 1985, the Racing Commission filed a motion to dismiss Lepman's appeal on the ground that it did not present a substantial question arising under the Constitution of the United States or of the State of New Jersey. The New Jersey Supreme Court granted this motion and dismissed Lepman's appeal on July 24, 1985 (App. 13a).

ARGUMENT

The Writ Sought Here Should Be Denied Because The Courts Below Correctly Interpreted And Applied The New Jersey Trainer Responsibility Rule.

In support of his petition, Lepman argues that the Trainer Responsibility Rule, which requires the trainer to protect and guard his horse against the administration of any drug, violates the due process clause in that it cre-

ates an impermissible irrebutable presumption. In essence, it is Lepman's contention that a violation of *N.J.A.C.* 13:70-14A.7 cannot be susptained in the absence of a demonstration by the Racing Commission that the drug detected in a horse through post-race testing also affected the horse's speed or performance. Based upon this incorrect premise, that the Racing Commission, through the Trainer Responsibility Rule, only intended to prohibit drugs which affect a horse's speed or performance in a race, Lepman argues that the Racing Commission, after finding that a drug is present in the horse's system following a race, presumes that the drug affected the horse's speed or performance. The "irrebuttable presumption" thus created, according to Lepman, is constitutionally improper. In support of this position, Lepman cites *Cleveland Board of Education v. LaFleur*, 414 *U.S.* 632 (1974), and *Stanley v. Illinois*, 405 *U.S.* 645 (1972). The irrebuttable presumption doctrine used in these two cases is not applicable here, however, for the following reasons. Moreover, the cases were properly decided by the New Jersey courts, present no issue of any public importance and, accordingly, require no further review by this Court.

First, no irrebuttable presumption exists in these cases. As the New Jersey Superior Court, Appellate Division held in both cases, the Racing Commission properly found that Lepman had violated *N.J.A.C.* 13:70-14A.7, which provides in pertinent part:

> (a) The owner, trainer, veterinarian, groom or any other person who is charged with the custody, care and responsibility of a horse, are all obligated to protect and guard the horse against the administration or attempted administration, either internally or externally, [of] any drug.

> (b) If the stewards shall determine that any person recited herein before in this rule has failed to protect and guard said horse in accordance with this rule, they may suspend and/or fine such individual or individuals.

This regulation has been interpreted by the New Jersey courts as imposing upon thoroughbred trainers a standard of strict liability in the event of pre-race administration of drugs to a horse under the trainer's responsibility. *Dare v. State,* 159 *N.J. Super.* 533, 536, 388 *A.*2d 984, 985 (App. Div. 1978). In *Dare v. State,* the Appellate Division recognized the strong public interest involved in the business of legalized gambling in horse racing and referred to the inherent dangers accompanying this enterprise:

> The language employed indicates that the Commission did indeed intend, by adopting the [Trainer Responsibility Rule], to place absolute responsibility upon the trainer in situations in which a horse has been administered a drug. [159 *N.J. Super.* at 536, 388 *A.*2d at 985].

The court held that such a strict liability standard was not violative of due process. 159 *N.J. Super.* at 538-539, 388 *A.*2d at 986. In the present cases, the Appellate Division held that Lepman's suspensions, which are strikingly similar on their facts to *Dare,* were manifestly proper (App. 3a to 4a; App. 9a to 10a). As in *Dare,* the suspensions here were imposed after Lepman's horses tested positive for phenylbutazone. The Appellate Division held that in such cases the trainers are absolutely liable under the clear provisions of the Trainer Responsibility Rule.

In its decisions, the Appellate Division rejected Lepman's meritless argument that the Racing Commission intended, in the regulations it has adopted, to prohibit only

drugs which affect a horse's speed or performance in a race. The Appellate Division held that the anti-inflammatory drug phenylbutazone, which was detected in the urine and blood samples taken from Lepman's horses following the races in question, was expressly prohibited by the Racing Commission's regulations (*N.J.A.C.* 13:70-20.11(a)(3)),* and that the plain language of the Trainer Responsibility Rule clearly showed that the intended restriction was upon *any* drug and not just stimulants or substances which are known to affect the speed and performance of a horse (App. 3a to 4a; App. 9a to 10a). In the present cases, therefore, the Racing Commission did not improperly presume that the drugs detected in Lepman's horses affected their speed or performance in a race. Here, Lepman was specifically charged with violating the Trainer Responsibility Rule, *N.J.A.C.* 13:70-14A.7, which as stated above, was intended to render a trainer responsible for failure to protect and guard "again the administration or attempted administration . . . of *any drug.*" (Emphasis added.)

Thus, no presumptions—irrebuttable or otherwise—are involved here, therefore, rendering inapplicable the

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* Under *N.J.A.C.* 13:70-20.11(a)(3), it is provided that a trainer shall not enter or start a horse that has been given an anti-inflammatory substance. Specifically, *N.J.A.C.* 13:70-20.11(a)(3) provides that a trainer shall not enter or start a horse that:

> [h]as been given in any manner whatsoever, internally or externally, any stimulant, depressant, local anesthetic, tranquilizer, *anti-inflammatory* [sic] or chemical of any kind or description prior to the race; . . . [Emphasis added.]

It is not disputed that phenylbutazone, the drug found in Lepman's horses following the races in question, is an anti-inflammatory drug (App. 4a; App. 10a).

holdings in *LaFleur* and *Stanley* upon which Lepman relies. Tests made of Lepman's horses' blood and urine following the races in question were positive for phenylbutazone which is unquestionably a drug. This positive finding was competent proof that Lepman had failed to "protect and guard" his horse against the administration "of any drug," as required by *N.J.A.C.* 13:70-14A.7, the only charge at issue. *Dare v. State, supra,* 159 *N.J. Super.* at 536, 388 *A.*2d at 985. Therefore, the suspensions imposed under the Trainer Responsibility Rule were clearly proper and the New Jersey Supreme Court correctly dismissed Lepman's appeals (App. 13a to 14a). In light of the plain language of, and authority contained in, *N.J.A.C.* 13:70-14A.7 and set forth uniformly in the existing case law, there is certainly no need for this Court to review the matter any further. Accordingly, Lepman's continued attempt to ascribe a different purpose to the regulations than was intended by the Racing Commission, in order to fashion a constitutional issue to support his petition to this Court, must fail.

Lepman's attempt to use the irrebuttable presumption doctrine in this case should also be rejected because the doctrine has been severely limited by this Court to situations quite dissimilar from the one presented here. The demise of the doctrine was advocated in a strong concurring opinion by Justice Powell in *Cleveland Board of Education v. LaFleur, supra,* 414 *U.S.* at 651, where he maintained that "irrebuttable presumptions" were really nothing more than legislative classifications which should be reviewed under equal protection analysis—that is, most commonly, under the rational basis standard. This view quickly found favor with the majority of the Court in

Weinberger v. Salfi, 422 *U.S.* 749, 767-770 (1975). There the Court used the rational basis test to review the duration of relationship requirements which widows needed to satisfy before qualifying for Social Security benefits. The Court distinguished *LaFleur* and *Stanley* as meriting greater scrutiny because these cases involved fundamental rights associated with the family and protected by the Constitution. *Weinberger v. Salfi, supra*, 422 *U.S.* at 771-772. Since the right to train a horse is not a fundamental right protected by the Constitution, *LaFleur* and *Stanley* do not apply here and the rational basis test governs instead.

It is beyond question that the objectives of the New Jersey Trainer Responsibility Rule challenged here—the protection of the horses involved and the preservation of the public trust in the horse racing industry—are legitimate state objectives. As the Appellate Division stated in *Dare v. State, supra,*

> The danger of clandestine and dishonest activity inherent in the business of horse racing has been well recognized. *Garifine v. Monmouth Park Jockey Club*, 29 *N.J.* 47, 55 (1959). The business itself and the legalized gambling which accompanies its activities are strongly affected by a public interest. *State v. Garden State Racing Ass'n*, 136 *N.J.L.* 173, 175 (E. & A. 1947). Corruption in horse racing activities is regarded as an affront to a publicly sponsored sport with the potential of far reaching consequences. *State v. Sipp*, 149 *N.J. Super.* 459, 460 (App. Div. 1977). Strict and close regulation is therefore regarded as highly appropriate. *Jersey Downs, Inc. v. Div. of N.J. Racing Comm'n*, 102 *N.J. Super.* 451, 457 (App. Div. 1968). [159 *N.J. Super.* at 536-537, 388 *A.*2d at 985.]

To achieve this goal, the New Jersey Legislature has vested the Racing Commission with broad powers "necessary

or proper to enable it to carry out fully and effectually all the provisions and purposes of this act." *N.J.S.A.* 5:5-22. The Racing Commission has also been granted power to prescribe rules under which horse races shall be conducted, *N.J.S.A.* 5:5-30, and to license trainers and other persons acting in any capacity with the training of race horses pursuant to such rules and regulations it may adopt. The New Jersey Legislature has expressed particular concern with attempts to influence race results through the use of drugs. In this regard, *N.J.S.A.* 5:5-71, among other things, proscribes the administration or attempted administration of *any drug* to a horse that is to run in a race. Significantly, *N.J.S.A.* 5:5-71 proscribes the use of *any drug,* and does not confine itself only to those drugs which may affect a horse's speed and performance. Thus, the Racing Commission's adoption of the Trainer Responsibility Rule, prohibiting the presence of *any drug* in a horse raced in New Jersey, was manifestly proper and in full accord with the legislative mandate. *Dare v. State, supra,* 159 *N.J. Super.* at 537-538, 388 *A.*2d at 986. Consequently, the regulations in issue here are rationally related to important state objectives, as the courts below found. Clearly, no question of federal law has been raised justifying review by this Court.

In applying the rational basis test, courts do not debate the wisdom of a particular policy, but rather leave such judgments to the legislative body charged with making the classification—that is, as long as its choice is reasonably related to a legitimate state objective. Whether another policy could achieve similar ends is immaterial, therefore, as long as the chosen policy meets the rational basis test. *See City of New Orleans v. Dukes,* 427 *U.S.* 297, 303 (1976).

Consequently, it is irrelevant if Lepman thinks that another rule would be better, or if other jurisdictions prefer different and less stringent rules more to his liking. Thus, the petition for writ of *certiorari* plainly does not raise a question of constitutional dimension which would warrant the granting of such extraordinary relief and the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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